STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2001-594

November 7, 2001

WPS ENERGY SERVICES, INC.
Request for Waiver Requiring a Customer
That Returns to Standard Offer Service
To Pay a Penalty to Leave Such Service
(Irving Forest Products Dixfield)

ORDER DENYING REQUEST
FOR OPT-OUT FEE WAIVER

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

Through this Decision, we deny WPS Energy Services' (WPS) request, on behalf of one of its customers, for a waiver of the opt-out fee provisions of Chapter 301. We do, however, reduce the fee by half and waive the application of interest charges.

II. BACKGROUND

On August 29, 2001, WPS filed a request for a waiver of the opt-out fee provisions of Chapter 301 (section 2(c)(2)). The WPS request is on behalf of Irving Forest Products Dixfield (IFPD). IFPD, a customer in Central Maine Power Company's (CMP) service territory, currently purchases its electricity supply from WPS. Pursuant to the provisions of Chapter 301, CMP assessed IFPD an opt-out fee of $321,218 after IFPD left standard offer service and returned to the competitive market in July, 2001.[1]

In its filing, WPS states that it initially began serving the IFPD load in September, 2000 pursuant to a contract with monthly billing based on the New England Independent System Operator (ISO-NE) market clearing prices for energy, ancillary products, and installed capacity (ICAP). The term of this contract was through April, 2002. WPS states further that in January, 2001, ICAP stopped being a market administered by ISO-NE and, because the associated ICAP market clearing price no longer existed, the WPS/IFPD contract was believed to be invalid. The parties thus agreed that the contract should terminate and that IFPD should receive standard offer service. Subsequently, in July, 2001, IFPD again became a customer of WPS under a new, 3-year contract.

WPS notes that the opt-out fee is intended to deter gaming and argues that a waiver is justified because WPS and IFPD were not trying to game the market when they agreed that IFPD should switch to standard offer service in January and then switch back to WPS in July; rather, the parties were trying to address circumstances caused by the elimination of the ICAP clearing price. WPS also states that the opt-out

[1]CMP sent the initial opt-out fee bill to IFPD on August 17, 2001. On September 19, 2001, CMP sent a second notice to IFPD regarding the opt-out fee plus a late payment charge of $4,346.08.

fee provisions of Chapter 301 had changed several times and it was unclear whether the fee would apply to IFPD.

III. DISCUSSION

Based on our review of the facts surrounding this case, we conclude that a waiver of the opt-out fee is not justified. We reach this conclusion because the decision for IFPD to take standard offer service and the subsequent decision to return to the competitive market were made based upon economic criteria, specifically, the relative cost to IFPD of standard offer service compared to service that WPS could provide. This use of standard offer service, basically as a temporary, lower cost option, is precisely what the opt-out fee is intended to discourage. However, as a result of mitigating circumstances, we will reduce the opt-out fee by half.

WPS does not dispute that the opt-out fee provisions of Chapter 301, on their face, apply in this situation. Rather, WPS argues that a waiver of the provisions is justified. In our Order adopting changes to the opt-out provisions, we discussed the potential need for waivers and the circumstances in which they might be appropriate:

> several commenters expressed a concern regarding customers whose return to standard offer service might be beyond their control or otherwise not related to gaming. This could occur, for example, if a provider suddenly goes out of business or decides to terminate service, resulting in the customer's automatically defaulting to standard offer service for a period of time. Under our rule, such a customer would be required to take standard offer service for 12 months or pay the opt-out fee; a result that might be unfair under the particular circumstances. Because it is difficult to articulate specific exemptions to the opt-out requirements that would be appropriate in all cases, we will entertain, on a case-by-case basis, requests for waivers of the opt-out fee, pursuant to section 10 of the rule, that demonstrate that the circumstances do not warrant the payment of an opt-out fee. Potentially relevant to a waiver request are such factors as whether the return to standard offer service was related to efforts to strategically game standard offer pricing and whether the failure to impose the fee would work an injustice on the standard offer supplier.

Order Adopting Rule and Statement of Factual and Policy Basis, Docket No. 2000-904 at 4 (Jan. 24, 2001).

In previous cases, opt-out fee waivers have been granted because of factors such as computer errors, personal issues, or when a delay in setting standard offer prices may have caused a customer to default to standard offer service for a short time. In these cases, the customers have returned to the competitive market as soon as possible, generally within a month or two. *See, e.g. Competitive Energy Services, Order Granting Waiver,* Docket No. 2001-577 (Sept. 24, 2001); *Niagara Mohawk*

Energy Marketing, Order Granting Waiver, Docket No. 2001-248 (April 10, 2001); *Gates Formed Fibre Products, Order Granting Waiver,* Docket No. 2001-226 (March 30, 2001).

In this case, however, IFPD's switch to standard offer service was not inadvertent or short term. While the question of switching was precipitated by the substantial increase in the ICAP deficiency charge, a development beyond the control of the parties, the actual decision to terminate the IFPD/WPS contract and have IFPD receive standard offer service was made in January, 2001 because the standard offer price at the time was less than then-current market prices. With the prices IFPD paid WPS under the contract indexed to market clearing prices, IFPD would save money as a standard offer customer. Thus, IFPD and WPS agreed to terminate rather than reform their contract.

WPS has suggested that the contract became invalid when the ICAP clearing price market was eliminated. However, although the elimination of the ICAP clearing price required some reformation of the contract, this could have been done and, in fact, was done for a 4-month period after the ICAP market was eliminated and before the contract was terminated in January, 2001.[2]

We conclude that the event that caused the parties to terminate the contract was FERC's decision in December 2000 that set a high ICAP deficiency charge and also drove ICAP market prices up. This (as well as other factors) caused the IFPD/WPS contract price to exceed the standard offer price and caused IFPD and WPS to agree to terminate their contract. About seven months later, market conditions were such that WPS could offer IFPD a lower price and, in July 2001, WPS again began serving IFPD.

In a fully competitive market, the circumstances presented in this case would have resulted in a reformation of the contract or the customer's contracting with a new supplier. However, in Maine's restructured electricity market, the standard offer, which is essentially a call option, provides an additional choice. This case requires interpretation of the restrictions we have placed on the exercise of the call option through our opt-out fee rules. Based on the circumstances presented, we conclude that the opt-out fee should apply.

The opt-out fee provisions were adopted to prevent customers from switching to standard offer service when prices are below market and returning to a competitive supplier when the price relationship reverses. Although, in this case, the switch to standard offer service occurred upon the early termination of a contract, this would also apply if a customer returned to standard offer service after the natural end of a contract term. As stated earlier, standard offer service is not a free option that customers or suppliers can exercise based on the relative economics of the market. Rather, for customers who have entered the competitive market, standard offer is a safety net when they need supply for a relatively short period of time, generally for reasons that are beyond their control or inadvertent. We expect customers who enter the

[2] In its filing, WPS states that ICAP market was eliminated in January, 2001. The market was actually eliminated effective August 1, 2000.

competitive market to remain there; such customers are allowed to switch to standard offer service for economic reasons, but if they do so, they must stay there for 12 months or pay an opt-out fee.

Finally, WPS states that the opt-out fee provisions in the rule have changed several times, and it was unclear whether any fee would apply in the current case. On the contrary, the provisions governing the applicability of the fee to the IFPD situation have been in effect continuously since November, 2000; the only relevant change was that the fee was increased effective March 1, 2001 for customers leaving the standard offer after that date.

For these reasons, we find that the waiver requested by WPS is not consistent with the purposes of the rule and we, therefore, deny the request. However, we find that mitigating factors exist that justify a reduction in the opt-out fee. First, as mentioned above, the events in this case were set in motion by the substantial increase in the ICAP deficiency charge. Second, our rules are relatively new and their interpretation is developing as waiver requests are presented to us. Third, a reduction in the opt-out fee would not appear to work an injustice on the current wholesale provider of standard offer power, because the customer was on the standard offer prior to the beginning of the current standard offer term[3] and customer migration is expected when market prices fall below standard offer rates.

Thus, in balancing the interests of the standard offer provider against considerations of fair treatment for the customer, we conclude that a reduction of the fee in half an appropriate resolution of this case. In addition, we waive interest charges that have accrued while the request for waiver has been pending.

Dated at Augusta, Maine, this 7th day of November, 2001.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

[3]The wholesale provider at the time the customer returned to standard offer service is not contractually entitled to any of the opt out fees.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.